IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

LETTERS PATENT APPEAL NO. 21 OF 1994
IN
FIRST APPEAL NO. 807 OF 1977

M/s. The Abu Marble Mining Pvt. Ltd.] .. Appellant (Org. Respondents)

Vs

The Regional Directors,]
Employees' State Insurance Corporation,]
ESIC Bhavan, Mumbai.] .. Respondents (Org. Appellant)

Mr. S.P. Vaidya for the appellant.

Mr. M.V. Jaykar for the respondents.

CORAM: F.I. REBELLO &
ANOOP V. MOHTA, J.

DATED: 27TH AUGUST, 2004.

ORAL JUDGMENT : *[Per F.I. Rebello, J.]*

1. This Appeal is against the judgment of the learned Single Judge dated 14th August 1992 in First Appeal No. 807 of 1977 under the provisions of the

Employees State Insurance Act, 1948 (hereinafter referred as “the said Act”). By his judgment dated 14th August 1992, the learned Single Judge was pleased to allow the Appeal preferred by the respondents herein against the order of the Employees Insurance Court at Mumbai dated 30th July 1977. The learned Insurance Court had framed the following issue for consideration : “Is the work of fixing and polishing of a marble, done outside the factory premises, a part of the extension of the work of the applicant's factory?” After considering the evidence led on behalf of the appellants herein, the learned Insurance Court held that the job of marble fixing outside the factory by employees engaged by the contractor had no connection whatsoever with the work of the factory. The learned Court further held that they were mainly carrying out marble fixing work and only incidentally, were utilising the products of the factory belonging to the appellant-company and, based on these conclusions, held that the employees engaged by the contractor would not fall within the extended definition of the word “employee” under Section 2(9) of the Act. It is this order which was the subject matter of Appeal under the Act before the learned Single Judge. The learned Single Judge, after consideration of the material and the various authorities cited arrived at the conclusion that the work done by the marble fixing contractor must be held to be done under the supervision of the principal employer viz. Respondent-company. The learned Single Judge further proceeded to hold as under:

> *"In my view, this leaves no manner of doubt whatsoever that the marble fixer in the present case was employed under the supervision of the principal employer and, indeed, in the facts of this case, he was his agent on the work which was ordinarily the part of the work of the factory establishment or which is preliminary to the work carried on."*

It is based on this finding that the learned Judge held that the employees employed by the marble fixer i.e. the immediate employer would be the employees of the principal employer within the meaning of Section 2 (9)(i)(ii) of the Act and consequently, reversed the judgment of the Employees Insurance Court. It is this order which is the subject matter of the present Appeal.

2. At the hearing of this Appeal, on behalf of the appellants, their learned counsel contends, that from the evidence on record, it would be clear that ordinarily the work of the factory is cutting, polishing and finishing the marble and selling the marble. The work of laying tiles cannot be a part of the work of the factory as the definition of the factory restricts it to premises and precincts and obviously, therefore, the laying of tiles cannot be the ordinary work of the factory. He then pointed out that the work of laying marble cannot be preliminary to the work carried out in the factory premises as it is only after cutting and polishing

that the work of laying marble could be undertaken. It is further pointed out that this work cannot be said to be incidental to the purpose of the factory and establishment considering that the purpose of the factory is of cutting and polishing the marble and, in fact, the work of laying is extraneous to the purpose of the factory. Reliance is placed on a large number of judgment which would be adverted to in the course of discussion.

On the other hand, on behalf of the respondents their learned counsel contends that the act is a beneficial legislation with the object of providing medical and other benefits to those who otherwise ordinarily are not in a position to avail of such benefits or to get financial assistance during the time when they are unemployed on account of medical unfitness. It is further pointed out that in the instant case, the contract to be considered is what is known as a complete contract, meaning thereby where a party enters into a contract, not only for purchase of marble, but also for laying the marble. It is further pointed out that insofar as the contractor is concerned, in his evidence it has come on record that he takes work only from the appellants herein. The material is supplied by the appellant-employer. The work is ancillary or incidental to the work of the factory and in these circumstances, it cannot be said that the view taken by the learned Single Judge was impossible of being taken or that the judgment suffers from any error of law. Learned counsel also has placed reliance on several judgments which

would be adverted to, in the course of discussion.

3. For the purpose of resolving the controversy, it would be necessary to refer to the definition of "employee" as set out in Section 2(9) (i)(ii) of the Act. The relevant portion reads as under:

> *"**2 ((9)** "employee" means any person employed for wages or in connection with the work of a factory or establishment to which this Act applies and -*
>
> > *(i) who is directly employed in the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or*
> >
> > *(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or"*

To reduce the controversy, it is not the case, either of the appellants or the respondent that the employees would be covered by the definition of "employee" under Section 2(9)(i) of the Act.

Section 2(9)(ii) of the Act, with which we are concerned, can be split up under the following heads:

(a) who is employed or by through an immediate employer on the premises of the factory or establishment.

(b) or, under the supervision of the principal employer or his agent on work, which is ordinarily part of the work of the factory or establishment,

(c) or, which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment.

We are not concerned with head (a) of the Section 2((9)(ii). The case then must fall under either of the other two heads for holding that the contractors' workers are employees.

4. In that context, let us examine the facts on record considering the

findings recorded by the Insurance Court as also by the learned Single Judge. No evidence was led on behalf of the respondents. It is only the appellants herein who had examined witnesses. Let us look at the evidence to see the real nature of the contract. Ratanlal Mularam Sharma was the person to whom the appellants had given the contract. In his evidence, he has set out that he works at Solapur for the appellants in fixing marble on piece rate basis. He engages employees to do such work under his supervision. Ordinarily, he does not employ any employees in the work undertaken by him. When he employed persons, he fixes their wages himself without consulting the appellants and even the working hours are fixed by him. In cross-examination, he admitted that the directions regarding the work and place are given by the person of the applicant-company. Insofar as polishing work is concerned, he has set out that at times polishing work is done by the applicant-company and at times, such polishing work is given to others on contract by the applicant-company. He has also stated that he does not take direct contract and only does labour work and fixes the marble supplied by the appellant-company. The other witnesses examined is Sattbodh Narayan Singte. In his evidence, he has set out that the work carried out in the factory is of processing marble stones. Employees in the factory select the material, cut, polish and finish it, according to the size given by the management. Fixing of marble is not the regular work of the company. The company receives three kinds of work orders. The first kind is where the customer themselves supply stones for cutting and polishing. The

second is when the customer come and select the material from the stock and then it is cut, polished and finished and the material supplied to the customer and the third type is what is known as a complete contract which is supplying, cutting, finishing and fixing the tiles. He admitted that during the year 1971-72. all the work mentioned in Exhibit-8 was the work of the complete contract i.e. the third type. The work on the site is done by the contractor engaged by the company and is done by the contractors themselves or through their employees. The customers supervise this contract. If the customers make complaint regarding the contract, then directions are given to the contractors. Such contractors do not work exclusively for the applicant-company. In cross-examination, he has admitted that when there is a full or complete contract, their responsibility is of laying the marbles and that has to be laid to the satisfaction of the customers. This is the evidence which has come on record.

5. With that, we may now consider the position on law insofar as the object of the Act and what is work in connection with and incidental to the work of the factory. The object of the Act is set out in the judgment in *Regional Director, ESIC, Madras Vs. South India Flour Mills (P) Ltd.,* **AIR 1986 Lab. I.C., 1193.** The Apex Court in that case observed as under:

> *"13. The Act is a piece of social security legislation enacted to provide for certain benefits to employees in case of sickness, maternity and employment injury. To hold that the workers employed for the work of construction of buildings for the expansion of the factory are not employees within the meaning of section 2(9) of the Act on the ground that such construction is not incidental or preliminary to or connected with the work of the factory will be against the object of the Act. In an enactment of this nature, the endeavour of the Court should be to interpret the provisions liberally in favour of the persons for whose benefit the enactment has been made."*

The Apex Court in *Royal Talkies, Hyderabad & Ors. Vs. ESI Corpn.,* **AIR 1978, S.C., 1478** has considered as to what is the meaning of the expression "in or in connection with" the work of an establishment. In paragraph 14, the Apex Court has observed as under:

> *"The expression `in connection with the work of an establishment' ropes in a wide variety of workmen who may not be employed in the establishment but maybe engaged only in connection with the work of the establishment. Some nexus exist between the establishment and the work of the employee but it may be a loose connection. `In connection with the work of an establishment' only postulates some connection between what the employee does and the work of the establishment. He may not do anything*

directly for the establishment; he may not do anything statutorily obligatory in the establishment; he may not even do anything which is primary or necessary for the survival or smooth running of the establishment or integral to the adventure. It is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the establishment."

Proceeding further, whether an amenity or facility provided for the customers has connection with the work of the establishment, the Apex Court proceeded to observe as under:

"The question is not whether without that amenity or facility the establishment cannot be carried on but whether such amenity or facility, even peripheral may be, has not a link with the establishment."

The Court then observed as under:

"All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. It is sufficient if it is incidental to it. A thing is incidental to another if it merely appertains to something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Much depends

on time and place, habits and appetites, ordinary expectations and social circumstances."

6. Considering the findings recorded by the learned Single Judge that the appellant is covered under the Act because the contractor is working as an agent, let us see some observation for that purpose in the judgment of the Apex Court in *C.E.S.C. Limited & Ors. Vs. Subhash Chandra Bose & Ors.,* **1992 1 CLR, 932.** For the purpose of being an agent, the requirements of Section 182 of the Indian Contract Act, 1872 must be fulfilled which defines "agent" as a person employed to do any act or to represent another dealing with third person. The person for whom such act is done or is so represented is called the principal. Considering the material on record in our case, can it be said that the work done by the contractor or any employee was that of an Agent.? In such a case, the person employed must do an act or represent another in dealing with third person. There is no such privity established on the facts of this case between the contractor of the appellant. The Contractor is not doing any work pursuant to a contract with a third person, acting on behalf of the principal. The interest of the so-called principal and so-called agent are businesslike. The dividing line between an independent contractor, engaged to do work for the principal employer and the agent doing work of the principal must be borne in mind, lest every independent contractor engaged by the principal for doing some work ordinarily not done by the principal

will have to be treated as an agent. The following observation from Halsbury's Law of England (Halsham Edition) Vol.1 at Page 145, Para 350, quoted in C.E.S.C. Ltd. (supra) Vol.5 are significant.

> *"An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given to him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control and supervision of the principal."*

It is the appellant who has engaged the contractor for doing the work. The work of fixing marble is a specialised job not done by the 'factory'. The principal engages several contractors to do the work of fixing whenever it is required to be done on piece rate basis. He is engaged to do work employing his own means, though the material is supplied by the principal. There is no control or interference exercised by the principal over the work of the contractor. Clearly, therefore, the test of agency would not be applicable on the facts of the present case.

7. Considering that, we may now consider the test of supervision which has to be considered to find out as to whether the work done by any employer is under the supervision of the appellant herein. The Apex Court, in paragraph 13 in C.E.S.C. L.H. (supra) has observed as under:

> *"13. In whatever manner the word `employee' under Section 2(9) be construed, liberally or restrictedly, the construction cannot go to the extent of ruling out the function and role of the immediate employer or obliterating the distance between the principal employer and immediate employer. In some situations he is the cut-off. He is the one who stumbles in the way of direct nexus being established, unless statutorily fictioned, between the employee and the principal employer. He is the one who in a given situation is the principal employer to the employee directly employed under him. If the work by the employee is conducted under the immediate gaze or overseeing of the principal employer, or his agent, subject to other conditions as envisaged being fulfilled, he would be an employee for the purpose of Section 2(9). Thus besides the question afore-posed*

with regard to supervision of the principal employer (the electrical contractors) over his employee was exercised, on the terms of the contract, towards fulfilling a self-obligation or in discharge of duty as an agent of the principal employer."

Proceeding further, the Apex Court then held :

"*When the employee is put to work under the eye and gaze of the principal employer or his agent, where he can be watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinise the quality thereof and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for the purposes of Section 2(9) of the Act. It is the consistency of vigil, the proverbial `a stitch in time saves nine'. The standards of vigil would of course depend on the facts of each case. Now this function, the principal employer, no doubt can delegate to his agent who in eye of law is his second self, i.e., a substitute of the principal employer. The meditate employer, instantly, the electrical contractors can by statutory compulsion never be the agent of the principal employer. If such a relationship is permitted to be established it would not only obliterate the distinction between the two, but would violate the provisions of*

> *the Act as well as the contractual principle that a contractor and a contractee cannot be the same person. The ESIC claims establishment of such agency on the terms of the contract, a relationship express or implied. But, as is evident, the creation or deduction of such relationship throws one towards the statutory scheme of keeping distinct the concept of the principal and immediate employer, because of diverse and distinct roles.*"

These, therefore, are the tests or considerations which must be borne in mind as to what constitutes `supervision'.

8. On behalf of the appellant, their learned counsel has relied on various judgments. They will be adverted to, to the extent necessary. In *South India Surgical Company Vs. The Regional Director, ESIC, Madras,* **1997, II, L.L.J., 396,** there were some contractors manufacturing surgical instruments for the company and were also using the furnace belonging to the company and for that purpose, the company was collecting some charges. Raw material was also supplied to the contractors for manufacturing purposes. The company had the right to reject the goods if the goods were not manufactured according to their prescription and satisfaction. On the facts of that case, the learned Division Bench of the Madras High Court held that there was no evidence established to show that the company was exercising any supervision over the disputed workmen and they

were working as employees of the independent contractors. In *Tata Tea Ltd., Bangalore Vs. ESIC, Bangalore,* **2000 II CLR, 980,** the Tea Trading Corporation, an outside contractor was given the job of packing tea by the appellant establishment which was engaged in blending and packing of tea. The issue was whether the appellant therein was liable to pay the contribution under the Act to the said contractors. It was not in dispute that the contractor was entrusted with the work of packing and despatch of tea in the factory premises. Considering the facts, the Court held that the appellant therein was not liable to pay charges for the workers employed by the contractor. In *ESIC, Trichur Vs. Pooppally Foods, Alleppey,* **1984 1, L.L.M., 800,** the respondent therein was a firm carrying on business in export of fish. It had given contracts for peeling and grading to independent contractors at their premises. It was found therein that the contractors were doing work for different persons. There was a further finding that the contractors were doing the work of selling or grading at several places outside the premises of the respondent firm. It was also found that the firm had no supervision over the work and the supervision was done by the contractor. On the facts therein, the learned Division Bench held that those workers would not be an `employee' under Section 2(9) of the Act. In *CEMENDIA Company Limited Vs. ESIC,* **1995 (1), Mh.L.J., 243,** the learned Judge was considering whether the employees employed at an establishment and at site were doing the work in

connection with the factory. After considering the various tests and the facts on record, the learned Single Judge held that insofar as Head Office is concerned, it was doing the work in connection with the factory, but that would not be so insofar as employees working at the site and accordingly held that the employees working at the site were not covered by the definition of `employee' under Section 2(9).

On the other hand, on behalf of the respondents, their learned counsel has firstly placed reliance in the judgment of *ESIC Vs. Premier Timber Supplies*, **1991 1 CLR, 669** to contend that even temporary employees as well as casual employees are covered. There can be no dispute that they will be covered if the employees are employed by the principal employer in work connected with or incidental to the work of the factory. In *M/s. Siddheshwar & Co., Hubli Vs. ESIC,* **1998, LAB, I.C., 157,** the issue before the learned Single Judge of the Karnataka High Court was whether casuals employed would be covered. The learned Judge observed that even if the employees are unidentified today or not was irrelevant and in the light of that, dismissed the Appeal preferred by the company. In *Poona Industrial Hotel Ltd. Vs. I.C. Sarin & Anr.,* **1980, LAB, I.C., 100**, the question before the Division Bench of this Court was whether in view of the fact that the kitchen fell within the definition of `factory', the other

establishment would also be covered and the employees working in the hotel fell within the definition of `employee' under Section 2(9). One of the arguments advanced was that at the highest, it is employees working in the kitchen alone who would be covered and not in the other premises. The learned Division Bench observed as under:

> *"There is not only geographical unity, but unity of ownership between the hotel and the kitchen in which food for the guests of the hotel is manufactured. In these circumstances, we do not see how kitchen can be carved out as a separate geographical or legal entity and treated as separate premises from the hotel as a whole. On the contrary, on the facts of this case it is inevitable that the kitchen must be treated as part of the hotel in view of the main function which has been assigned to it viz. The preparation of food for the purpose of catering to the needs of the patrons accommodated in the hotel."*

9. Considering all these judgments, we now come back to the facts of this case. We have earlier noted the evidence on record. From the evidence on record,

what is clear is that the contractor was only doing the work of laying tiles/ marble. Even the polishing work at the site, from the evidence of Sharma, was not done by the contractor. It was done either by the company or given on contract. The work of the factory, as has come in the evidence, was processing marble stones which was cutting, polishing and finishing, according to size. As pointed out earlier, the employees to be covered have either to be working under the supervision of the principal employer or his agent and doing work, which is ordinarily part of the work of the factory or establishment. From the evidence nothing has been placed on record to show that the appellant principal employer was supervising the work of the immediate employer i.e. the contractor. The only evidence that has come on record is that it is the person who had given the contract to the appellant who was supervising the work. This cannot be said to be supervision by the employer. The test of supervision must be the test as laid down by the Apex Court in the case of CESC Ltd. & Ors. *(supra)*. Those tests are, therefore, not satisfied. We have also earlier noted that the immediate employer or the contractor cannot also be said to be the agent of the appellant as the immediate contractor was engaged by the principal employer to carry out the work of laying of the marble and paying to him consideration on the piece rate basis. The test of the agent again, as contained in the provisions of Section 182 of the Indian Contract Act and as laid down in CESC Ltd. & Ors. *(supra)* are not satisfied. The contractor is not working under the supervision of the principal employer or his agent. The immediate employer will

not fall within head (b) as split up and seen in paragraph 3.

10. The other test to be applied is whether the work of laying, even in a case of a complete contract can be said to be incidental to the work of the factory or establishment. The work of the factory, as has come in evidence, is cutting, polishing and finishing. It is only when a complete contract is taken, the principal employer is required to carry out also the work of laying or fixing the marble. Merely because the establishment is a 'factory' it does not mean that even contractor's employees engaged by an employer would necessarily fall within the definition of 'employee' under Section 2(9). They must do work incidental to the purpose of the factory. The work of the factory has been spelt out earlier. Merely because the material is supplied at the site and that is laid by the contractor i.e. Immediate employer, it cannot be said that, that would be work which is incidental to the work of the factory or for the purpose of the factory. Incidental for the purpose of the factory would mean that it has some connection with the ordinary work of the factory. That is not the evidence in the instant case. The work of the factory is cutting and polishing marble. Head `c' of the definition of employee in paragraph 3 will also not be attracted.

11. We are clearly, therefore, of the opinion that on the material on record there was nothing to show that the employees engaged by the immediate employer

fell within the extended definition of `employee' within the meaning of Section 2 (9) of the ESIC Act. We are, therefore, clearly of the opinion that the learned Single Judge erred in law in holding that the test of supervision and agency had been satisfied.

12. In the light of that, Appeal allowed. The order of the learned Single Judge is set aside. The order of the Employees Insurance Court is restored.

[F.I. REBELLO, J.]

[ANOOP V. MOHTA, J.]